Laborers' International Union of North America, Local 616, AFL–CIO; International Association of Plasterers and Cement Masons, Local 296, AFL–CIO; International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 453, AFL–CIO *and* Bruce and Merrilees Electric Company; and the Trumbull Corporation and International Brotherhood of Electrical Workers, Local 307, AFL–CIO. Cases 5–CD–295, 5–CD–296, 5–CD–297, 5–CD–298, 5–CD–301, and 5–CD–302

May 7, 1991

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND RAUDABAUGH

The charges in this Section 10(k) proceeding were filed June 19 and 27, and July 11 and 23, 1990, by the Employer, Bruce and Merrilees Electric Company, and by Electrical Workers Local 307, alleging that the Respondents, Laborers Local 616, Cement Masons Local 296, and Teamsters Local 453, violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees those Unions represent rather than to employees represented by Electrical Workers Local 307. The hearing was held August 9 and 10, 1990, before Hearing Officer Nathan W. Albright.

The National Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

Bruce and Merrilees Electric Co., a Pennsylvania corporation, is an electrical contractor engaged in the business of electrical construction with an office and place of business in Luke, Maryland. During a representative 12-month period, Bruce and Merrilees received gross revenues in excess of $500,000 and purchased and received at its Luke, Maryland jobsite goods, materials, and services valued in excess of $50,000 directly from points located outside the State of Maryland. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The record indicates, and we find, that Laborers Local 616, Cement Masons Local 296, Teamsters Local 453, and Electrical Workers Local 307 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

Trumbull Corporation is the general contractor for a portion of highway construction on Route 48 near Cumberland, Maryland. On July 28, 1988, Trumbull and Bruce and Merrilees entered into a subcontract whereby Bruce and Merrilees would be responsible for the construction of all highway lighting on the portion of road constructed by Trumbull. Bruce and Merrilees is signatory to a contract with Electrical Workers Local 307, and it used employees represented by Local 307 to perform the work in dispute. Trumbull's project manager on the jobsite is Virgil Rasmussen.

In the fall of 1989, Charlie Colefield, a job steward and admitted agent for Laborers Local 616, and Ralph Arnold, a job steward and admitted agent for Teamsters Local 453, told Rasmussen that certain work associated with the installation of highway lights belonged to their Unions, not to the IBEW. In late spring, 1990, Rasmussen once more was approached by Colefield and Arnold. They again claimed the work.

On or about June 11, 1990, Bruce and Merrilees had several employees on the job pouring concrete bases for light poles. During the afternoon, Colefield and Arnold came up to the jobsite, and Colefield grabbed the concrete chute from a Bruce and Merrilees employee and began pouring the concrete. Colefield said that Laborers Local 616 would handle the concrete on this job. Arnold was present during this encounter. Also on this date, about 2 hours after work had begun, approximately 10 out of 16 members of Teamsters Local 453 working on the project left the jobsite as allegedly sick and approximately 6 out of 40–45 members of Laborers Local 616 working for Trumbull reported out as allegedly sick to their foreman.[1]

On or about June 26, 1990, Bruce and Merrilees' foreman Watkins was working with several Bruce and Merrilees employees finishing cement on the foundations for several light poles. James Winkler, a business agent and admitted agent for Cement Masons Local 296, came to the jobsite along with Arnold from Teamsters Local 453. Winkler told Watkins not to touch any more of the footers, and there was an apparent exchange of profanity between Watkins and Winkler. Watkins asserts that he continued working and Winkler picked up a shovel from the jobsite and swung and hit him with the shovel. Watkins then ran to his truck and took a baseball bat from the seat for protection. Winkler asserts that Watkins came at him first with the baseball bat and that he was using the shovel only as a protective device.[2]

[1] Three out of the six returned after an hour.

[2] We note that on October 10, 1990, after the hearing was closed, Electrical Workers Local 307 submitted for inclusion in the record a September 27, 1990 criminal conviction against Winkler for battery. As this judgment did not be-

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There remained work to be done on the construction and installation of light poles for Trumbull. To complete this job, Trumbull took the work away from Bruce and Merrilees and assigned it to its own employees represented by Respondent Unions at the end of June or the first of July 1990.

B. *Work in Dispute*

The parties are in agreement that the work in dispute is the digging, backfilling, and tamping of ditches, the pouring and finishing of cement or concrete which forms the footers of light poles associated with the installation of highway lighting erected on one section of Maryland State Highway 48 running through Rocky Gap State Park near Cumberland, Maryland. It also includes the hauling of electrical conduit and associated electrical supplies to, from, and around the jobsite.[3]

C. *Contentions of the Parties*

The Employer, Bruce and Merrilees, contends that the work should be assigned to its employees represented by Electrical Workers Local 307. However, Trumbull, the general contractor, has taken the work away and is now assigning that work to its own employees represented by the other Unions because this is necessary to maintain construction on the jobsite. Trumbull has also claimed that it is losing money performing the work as it is currently assigned. The Employer asserts it is more economical and cost-effective to use employees represented by Electrical Workers Local 307. Electrical Workers Local 307 claims the work should be assigned to employees represented by it, based on all relevant factors, including its contract with Bruce and Merrilees.

The Respondents all contend that their collective-bargaining agreements with Trumbull entitle them to perform the aspects of the work in dispute relating to their respective work jurisdictions, and that Trumbull's subcontract with Bruce and Merrilees violates their collective-bargaining agreements. Cement Masons Local 296 did not file a timely brief, but asserted at the hearing that the past practice in the industry has always been to use Cement Masons Local 296 for finishing concrete footers for light poles in the area. Cement Masons Local 296 also asserted that the factors of relative skills and economy and efficiency of operations favor the employees it represents. Laborers Local 616 and Teamsters Local 453, besides claiming that they have disclaimed the disputed work, rely heavily on provisions in their contracts with Trumbull and also argue that this is not a jurisdictional dispute.[4] Indeed, Laborers Local 616 has moved to quash the 10(k) notice based on this last argument. It also claims the work should be assigned to it in the event a jurisdictional dispute is found to exist.[5]

D. *Applicability of the Statute*

Before the Board proceeds with a determination of dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated.

Here, there is evidence that Charles Colefield and Ralph Arnold, admitted agents for Laborers Local 616 and Teamsters Local 453, respectively, repeatedly asserted claims to the disputed work to Project Manager Rasmussen. Three days after one of these claims, during the afternoon of June 11, Colefield pressed the claim by wrestling a concrete chute away from a Bruce and Merrilees employee in the presence of Arnold, after which laborers proceeded to perform the work. There is also evidence that on the morning of the same day, members of Teamsters Local 453 and Laborers Local 616 simultaneously walked off the job in a ''sickout.'' Finally, Bruce and Merrilees' foreman, Watkins, testified that on June 26, in the presence of Arnold, Cement Masons Local 296's agent, Charles Winkler, swore at him, instructing him not to touch any of the concrete footers, and then hit him with a shovel.[6]

Based on the above evidence and testimony, we find reasonable cause to believe that Colefield and Winkler engaged in conduct, acquiesced in and condoned by Arnold, that had an object of forcing the work in dispute to be assigned to laborers, teamsters and cement masons. We further find reasonable cause to believe that members of the Laborers and the Teamsters en-

come available until after the close of the hearing, and no party contests its relevance, we include it in the record. However, given the testimony concerning Winkler's actions, we find it unnecessary to rely on his subsequent conviction.

[3] At the hearing, no party disputed the accuracy of the description of the disputed work contained in the 10(k) notices of hearing.

[4] Teamsters Local 453 also contends that it engaged in no coercive activity regarding the assignment of work.

[5] Teamsters Local 453 and Laborers Local 616 raise an additional contention, claiming that Trumbull, not Bruce and Merrilees, should be considered the employer for purposes of resolving this 10(k) dispute. Laborers Local 616 points out that Trumbull had contractually obligated Bruce and Merrilees to abide by the same craft jurisdiction requirements that bound Trumbull, and had retained the power to remove portions of the subcontract.

Laborers Local 616 further argues that in similar situations the Board has found the general contractor to be the employer. The cases it cites are distinguishable. In *Electrical Workers Local 439 (Dunn Construction Co.)*, 195 NLRB 976 (1972), the general contractor had pulled the subcontractor off the job prior to the commencement of illegal activity. In *Bricklayers Local 15 (J. A. Jones Construction)*, 181 NLRB 1092 (1970), illegal activity occurred prior to the general contractor's assignment of the work.

However, aside from Trumbull's power to take the work away from Bruce and Merrilees, no one contends that Bruce and Merrilees lacked day-to-day control of the job in the critical period or that when the alleged illegal activity began, Bruce and Merrilees was not the employer in charge of assigning and supervising the disputed work. Therefore, we find Bruce and Merrilees to be the employer.

[6] We are aware that the testimony concerning Colefield's and Winkler's conduct conflicts with the testimony of others. However, in 10(k) proceedings, a conflict in testimony does not prevent the Board from finding evidence of reasonable cause and proceeding with a determination of the dispute. *Sheet Metal Workers Local 107 (Lathrop Co.)*, 276 NLRB 1200 (1985), citing *Laborers Local 334 (C. H. Heist Corp.)*, 175 NLRB 608, 609 (1969).

gaged in a work stoppage in support of their Unions' claims to the disputed work. In doing so, we reject the two Unions' contention that there was no work stoppage, i.e., that the employees left the job because they were sick. Here 16 employees, l0 teamsters and 6 laborers, suddenly claimed illness at the same time and on the same day that two of their representatives engaged in conduct aimed at acquiring a portion of the disputed work. These circumstances provide a reasonable basis for inferring that what was involved was a work stoppage in the guise of a sickout.[7] We also find that the Laborers and Teamsters must bear responsibility for the walkout because their representatives took no steps to disavow their members' conduct or to try to get them to go back to work.[8]

Regarding the assertions that Teamsters Local 453 and Local 616 have disclaimed the work, we find that the disclaimers are ineffective. Teamsters Local 453's pursuit of relief through arbitration is ''inconsistent'' with its contention that it has disclaimed the work.[9] In any event the Teamsters' disclaimer amounted to an empty gesture because it came after the assignment of the work had been taken out of the hands of Bruce and Merrilees and the latter's employees had been replaced by Trumbull's employees,[10] as a result of coercive conduct engaged in by the three Unions. We also note that the Teamsters did not relinquish its claim to any of the work as performed by Trumbull employees.

Laborers Local 616's disclaimer is likewise flawed. Although the disclaimer ran to work performed by employees of Bruce and Merrilees, it was made at a time when Bruce and Merrilees was no longer the employer in charge of assigning the disputed work to anyone and, further, was rendered equivocal by two contradictory statements at the hearing. A representative of Laborers Local 616 stated that he was not sure what Laborers Local 616 would do if the work was reassigned back to Bruce and Merrilees from Trumbull because the representative did not know how its International would react. Later, a representative of Laborers Local 616 stated that if the work was reassigned to Bruce and Merrilees, the Union would not make a claim for the work.

Teamsters Local 453 and Laborers Local 616 also argue that the Board should look to the real nature of the dispute and that such an inquiry here reveals that this is really a contractual, not a jurisdictional, dispute, citing *Electrical Workers Local 103 (T Equipment Corp.)*, 298 NLRB 937 (1990). In that case the IBEW demanded arbitration against an employer because it allegedly had violated a subcontracting clause in the contract between it and the IBEW. However, in *T Equipment*, union action was directed against the party with whom the union had a collective-bargaining relationship. In this case, Bruce and Merrilees, the primary target of union action, has no collective-bargaining relationship with the Respondent Unions. Furthermore, this is not a case where the union activity is designed to protect work historically performed by its members against an attempt to subcontract it. In the case at hand there is no evidence, prior to coercion, that Trumbull had ever assigned the work in dispute to the Respondent Unions.[11] Therefore, we deny Laborers Local 616's motion to quash.

We find reasonable cause to believe, therefore, that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

[7] Both the Laborers and the Teamsters cite the testimony of Virgil Rasmussen, Trumbull's project manager, to support their contentions concerning their members leaving the job as sick. Specifically, they rely on Rasmussen's testimony that ''I never associated it to be a work stoppage. I accepted the fact that these people were sick. I had no evidence otherwise.'' Their reliance on this testimony is misplaced. The context of the quoted testimony reveals certain inconsistencies. Rasmussen had been asked if he thought the incident of people walking out sick was related to the jurisdictional dispute, and he replied that it was all occurring about the same time. Then he was asked if the jurisdictional dispute caused the incident, and he testified as quoted above, and then, in the next sentence, he testified ''We informed those people that if they were going to be sick, we needed replacements the following day.'' He testified that by the next day, everyone was back, on the job (in fact three of the laborers returned in an hour). It is doubtful that he thought that they were genuinely ill, otherwise he would not have told them to inform him ''if they were going to be sick.'' Moreover, there is earlier testimony from Rasmussen that conflicts with his statement that he did not consider the incident to be a work stoppage. Rasmussen was reminded of a conversation he had had about the incident. He was asked if the reason he had mentioned that several teamsters and laborers had left the job was that it was very likely related to the jurisdictional problem. He admitted, ''It could have been related, yes.'' Considering Rasmussen's testimony as a whole, and other evidence, including the timing of the incident and the fact that members of two different unions were simultaneously taking the same action, we find reasonable cause to believe that the so-called sickout was motivated by jurisdictional concerns.

[8] In *Los Angeles Building Trades Council (Standard Oil Co.)*, 105 NLRB 868, 874 (1953), partially overruled on other grounds in 119 NLRB 1026, 1031 (1957), the Board held two locals responsible for a strike of their members because of their failure to disavow the strike. Like this case, in that case union members engaged in a simultaneous mass action in leaving and returning to work, and both locals failed to disavow their members' conduct in walking out. See also *Plumbers Local 412 (Zia Co.)*, 250 NLRB 863, 865 (1980) (jurisdictional dispute found to exist in situation in which pipefitters left their jobs and went to a ditch where laborers were installing a clay sewer line to learn how to do the work, and their steward asserted the work belonged to their union).

[9] *Iron Workers Local 197 (Del Guidice Enterprises)*, 291 NLRB 1, 2 (1988), citing *Sheet Metal Workers Local 107 (Lathrop Co.)*, 276 NLRB 1200, 1202 (1985). Chairman Stephens finds this is not inconsistent with his position in *Laborers Local 731 (Slattery Associates)*, 298 NLRB 787, 791 (1990), in which he made clear that conduct beyond the pursuit of the contractual grievance-arbitration procedure could properly be considered as an element of an 8(b)(4)(D) violation. That is this case. Here, the Teamsters' representative not only claimed the work but acquiesced in the 8(b)(4)(i) and (ii)(D) conduct of Colefield and Winkler. Moreover, the Teamsters, through its members, also participated in a work stoppage.

[10] We note, however, that there is an allegation that Bruce and Merrilees still hauls material around the jobsite.

[11] The only possible exceptions to this are a few occasions when members of the Respondent Unions were provided to Bruce and Merrilees by Trumbull to do some of the work, apparently in order to forestall jurisdictional disputes of the type now before us.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of the dispute.

1. Certification and collective-bargaining agreement

There are no certifications in this case. Electrical Workers Local 307 has a contract with the Employer which does not define the scope of the work. However, the parties have interpreted it to refer to highway lighting work. None of the Respondent Unions have a collective-bargaining agreement with the Employer. Therefore, consideration of the collective-bargaining agreement favors an award of the disputed work to employees represented by Electrical Workers Local 307.

2. Employer preference and past practice

The Employer prefers employees represented by Electrical Workers Local 307 to perform the disputed work, and has an extensive past practice of assigning employees represented by this Union the type of work in dispute. Therefore, employer preference and past practice weigh in favor of assigning the disputed work to the employees represented by Electrical Workers Local 307.

3. Area and industry practice

Electrical Workers Local 307 introduced evidence in the record regarding area and industry practice which primarily involved the installation of highway lighting on various sections of the highway construction project on Route 48 between Cumberland and Hancock, Maryland. Of the four sections which involved highway lighting, this segment of the work was in each case subcontracted to a subcontractor which had a bargaining relationship with Electrical Workers Local 307 and the work was assigned to employees represented by that Union.[12] In addition to the Route 48 project, Electrical Workers Local 307 also provided four examples of highway lighting jobs on which employees it represented did the highway lighting work.

Employees represented by Laborers Local 616 did the type of work in dispute on two jobs. Cement Masons Local 296 gave numerous examples during the hearing of jobs its employees had done. Most of the jobs were either not highway jobs or not recent. Of those jobs to which testimony attributed a timeframe, only four were roadway lighting jobs that were less than 6 years old. While the evidence presented by Respondent Unions may show that the area practice of using electricians is somewhat mixed, it appears that employees represented by Electrical Workers Local 307 are assigned the work in the majority of instances. Thus, this factor weighs in favor of assigning the disputed work to employees represented Electrical Workers by Local 307.

4. Relative skills

Although the Respondent Unions have challenged the relative skills of employees represented by Electrical Workers Local 307 to perform the work in dispute, the record establishes that employees represented by this Union have been performing the work for a substantial period of time; and there is no evidence that any of the work in dispute performed by these employees was not considered satisfactory by the general contractors or the relevant subcontractors involved in the highway construction projects or that this work ever failed to pass inspection by the State of Maryland.

No party has disputed that employees represented by the Respondent Unions possess adequate skills to perform their respective portions of the work in dispute. Accordingly, we find that this factor favors neither of the respective competing groups of employees.

5. Economy and efficiency of operations

No one of the Respondent Unions claims the right to perform the entire process associated with the work in dispute. On the other hand, Electrical Workers Local 307 argues that use of the employees it represents would mean that only one of the competing groups of employees would be required to do all the disputed work. Because employees represented by Electrical Workers Local 307 could do all the work and each of the Respondent Unions claim only part of the work, we find that the use of employees represented by Electrical Workers Local 307 would be more efficient. Therefore this factor favors an award of the disputed work to employees represented by Electrical Workers Local 307.[13]

[12] On the first section, some of the work of the type in dispute was originally done by employees represented by the Operating Engineers and Laborers Local 616. However, Electrical Workers Local 307 successfully asserted a contractual right to the work in a grievance with the electrical subcontractor. The second section is the site of the current dispute and employees represented by Electrical Workers Local 307 are no longer doing the work there as a result of the events set forth in the section of this decision titled ''Background and Facts of the Dispute.'' We shall disregard this reassignment and not consider it as part of area practice because the change reflects coercion and not a voluntary shift in practice.

[13] Laborers Local 616 argues that Trumbull testified it was more efficient to use laborers and other crafts than to use electricians. However, Trumbull stated that the jurisdictional dispute contributed to this state of affairs, as did

6. Safety

The evidence presented on the issue of safety is not sufficient to favor the claims of either Local 307 or the Respondent Unions.

Conclusions

After considering all the relevant factors, we conclude that employees represented by Electrical Workers Local 307 are entitled to perform the work in dispute. We reach this conclusion relying on the collective-bargaining agreement, employer preference and past practice, area practice, and efficiency.

In making this determination, we are awarding the work to employees represented by International Brotherhood of Electrical Workers, Local 307, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Bruce and Merrilees Electric Company represented by the International Brotherhood of Electrical Workers, Local 307 are entitled to perform the digging, backfilling, and tamping of ditches, the pouring and finishing of cement or concrete which forms the footers of light poles associated with the installation of highway lighting erected on one section of Maryland State Highway 48 running through Rocky Gap State Park near Cumberland, Maryland. They are also entitled to perform the hauling of electrical conduit and associated electrical supplies to, from, and around the jobsite.

2. Laborers' International Union of North America, Local 616; International Association of Plasterers and Cement Masons, Local 296; and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 453 are not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Bruce and Merrilees Electric Co. to assign the disputed work to employees represented by it.

3. Within 10 days from this date, Laborers Local 616, Cement Masons Local 296, and Teamsters Local 453 shall notify the Regional Director for Region 5 in writing whether they will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.

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the deadline Trumbull was facing. The record further indicates that the type of equipment used by Trumbull employees was different from and faster than the type of equipment available to Bruce and Merrilees employees.